IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 6873 of 2003

For Approval and Signature:

HON'BLE MR.JUSTICE JAYANT PATEL

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

BARODA TRADERS CO OP BANK LTRD.

Versus

MAHAVIR PETROLEUM THROUGH PROPRIETOR

Appearance:

1. Special Civil Application No. 6873 of 2003

MR KM PATEL for Petitioner No. 1

MR SHIRISH JOSHI for Respondent No. 1

NOTICE SERVED BY DS for Respondent No. 2-3

CORAM : HON'BLE MR.JUSTICE JAYANT PATEL

Date of decision: 03/11/2003

ORAL JUDGEMENT

Leave to delete the respondent No.3. Mr.Joshi appears for respondent Nos 1 & 2 (original appellants before the tribunal).

2. Rule. Mr.Joshi waives service of rule on behalf of respondents. With the consent of parties matter is taken up for final hearing today.

3. The only point arises for the consideration of this court is : Whether the tribunal was justified in setting aside the exparte judgement and award passed by the Ld.Nominee without putting any condition to deposit or not?

4. The short facts of the case appear to be that the petitioner-Bank filed Lavad Case No.1430/98 against the respondents for recovery of Rs.8,10.263/- with interest. It is the case of the petitioner-bank that the summons was served. However, the case of the respondents is that the summons was not served and the respondent No.1, at the relevant point of time, was outside the country. The learned Nominee passed the judgment and award on 17.6.03 for recovery of Rs.8,10,263/- with interest at the rate of 19% p.a. from 30.9.98 and expenses of Rs.5.035/-. The respondent Nos 1 & 2 preferred appeal before the tribunal being Appeal No.140/02. The tribunal had initially below stay application granted stay against the execution of decree on condition to deposit 12% of the decretal amount. The petitioner-Bank had preferred Special C.A.No.12535/02 before this court and the said petition was admitted and the interim stay granted by the tribunal was stayed by this court. The petitioner bank preferred execution application and pending the said execution application main appeal itself came to be heard by the tribunal and the tribunal ultimately as per decision dated 24.4.03 allowed the appeal and quashed and set aside the judgment and award passed by the learned Nominee with a direction to decide the matter afresh. It is, under these circumstances, the present petition is preferred before this court.

5. Normally, in the matter of setting aside the exparte judgment and award, more particularly, in respect of loan transaction, the court while considering the matter for exercising discretion to set aside the exparte judgment and award, would consider that no litigant is allowed to take any undue benefit of its own default or no litigant would take any undue benefit of delay caused in the proceedings. If the judgment and award, more particularly, or money decree is based on the transaction of bank loan, or similar such transaction and if such cases are considered leniently, and if same is quashed and set aside on the ground of procedural lapses or may be the default in not remaining present while defending

the suit, the same would encourage the dilatory tactics on the part of litigant for allowing the exparte judgment and award to be passed and thereafter to challenge the same. Therefore, at that stage, when the matter is considered for quashing and setting aside the exparte judgment and award of the lower authority the discretion should be judiciously exercised and the attempt should be made on the part of the tribunal to curb such type of delay or to curb the undue benefit being enjoyed by the person who did not defend the suit in time.

6. I would have considered the matter further, however, Mr.Josahi for respondent Nos 1 & 2 has fairly submitted that the respondent Nos 1 & 2 are ready and willing to deposit 25% of the decretal amount out of which 12% is already deposited pending the appeal before the tribunal and the respondent Nos 1 and 2 shall deposit the balance 13% of the decretal amount within a period of two months from today. Therefore, I find it proper to leave the matter at that stage.

7. In view of the above, since the tribunal has unconditionally remanded the matter it would be just and proper to modify the order passed by the tribunal only to the extent that such order of remand shall operate upon the condition to deposit the balance 13% of decretal amount within a period of two months from today. Since the suit is, even otherwise, of the year 1998 and the tribunal has not provided any time limit I find it proper to modify the judgment and award of the tribunal also for for directing for disposal of the suit so that the matter can be put to an end.

8. In view of the aforesaid in my view that the following directions shall meet with the ends of justice:

(i) The judgment and order of the tribunal, dated 24.4.03 which is impugned in this petition shall stand modified to the extent that the said judgment and order of the tribunal shall operate on condition that the respondent Nos 1 and 2 shall deposit 25% of the decretal amount within a period of two months from today with the clarification that the petitioner shall be at liberty to withdraw the said amount already deposited pending the appeal before the tribunal and the balance amount shall be deposited within a period of two months from today with the Registrar of Board of Nominees and the petitioner shall also be at liberty to withdraw such

balance amount.

(ii) The aforesaid withdrawals of the amount by the petitioner shall be on furnishing undertaking to the satisfaction of the learned Nominee that such amount shall be deposited upon the dismissal of the suit and withdrawal of the amount shall be subject to final judgment and award which may be passed by the Ld.Nominee after the trial.

(iii) The Ld.Nominee shall give priority to the suit and shall make attempt to disposed of the suit as early as possible preferably within a period of six months from the date of receipt of writ of this court.

However, it is clarified that before the suit is taken up for trial or before the evidence is led the respondent Nos 1`& 2 shall have to comply with the condition of depositing the amount as directed earlier.

9. The petition is allowed in terms of the aforesaid directions only. Rule is made absolute to the aforesaid extent. In the facts and circumstances of the case, there shall be no order as to costs.

3.11.2003 (JAYANT PATEL,J)